



FH

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWK/159058

PRELIMINARY RECITALS

Pursuant to a petition filed July 15, 2014, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Cty Disability Services Division-DSD in regard to Medical Assistance, a hearing was held on August 21, 2014, at Milwaukee, Wisconsin. The record was held open to give Petitioner's mother an opportunity to review the Level of Care though nothing additional was submitted to the Division of Hearings and Appeals.

The issue for determination is whether the agency correctly discontinued Petitioner's eligibility for Children's Long Term Support Programs by determining that he no longer meets the institutional level of care eligibility criteria.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Samella Jolly

Milwaukee Cty Disability Services Division-DSD
Attention: Mark Stein-DSD
1220 W. Vliet Street, Suite 300
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.

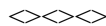
2. Petitioner has been eligible for Children's Long Term Support Waiver Programs for about 4 years. That eligibility was discontinued effective June 30, 2014 with the local agency determining that Petitioner no longer met the level of care requirement.
3. Petitioner is 10 years of age (8/19/04). He has diagnoses of tracheostomy, subglottic stenosis, bilateral paralyzed vocal cord paralysis and chronic lung disease. He does use a Passy-Muir® Tracheostomy & Ventilator Swallowing and Speaking Valve to help with speech at school. A sleep apnea monitor is used nightly. A g-tube is used daily for medications and about once a week for nutrition. He does need some assistance with dressing. Eating must be monitored to prevent choking and aspiration. He uses a wheelchair for long distance travel/heavy walking. He entered the 5th grade in the fall of 2014 but academically functions at the 3rd grade level. He has an assigned nurse at school and if the nurse is not there he cannot go to school.

DISCUSSION

The Department of Health Services maintains a web site that links the various resources used by the Department to describe the Wisconsin's Children's Long-Term Support Waivers program and details the criteria used to determine eligibility:

Wisconsin's Children's Long-Term Support Waivers (CLTS Waivers) make Medicaid funding available to support children who are living at home or in the community and who have substantial limitations due to developmental, emotional, and/or physical disabilities. Funding may be used to support a range of different services that are identified based on an assessment of your child's specific needs and identified goals or outcomes.

<http://www.dhs.wisconsin.gov/children/clts/waiver/family/index.htm>



All children or young adults must meet the basic requirements listed below for CLTS Waivers eligibility. To qualify for certain types of funding, there may be [additional requirements](#).

To participate in the CLTS Waivers, your child must:

- be under 22 years of age;
- be eligible for Wisconsin Medicaid, including:
 - be a United States citizen or have acceptable immigration status;
 - be a Wisconsin resident;
 - not have income in their name in excess of the current Medicaid standards;
- live at home or in a foster care setting;
- have a [level of care](#) (PDF, 134 KB) need that is typically provided in an institutional setting such as a hospital, a nursing home, or an institution for people with developmental disabilities;
- be able to receive safe and appropriate care at home and/or in the community; and
- be able to receive safe and appropriate care at home and/or in the community that does not have a cost to the Wisconsin Medicaid Program that exceeds the cost Medicaid would pay if the child were in an institution

<http://www.dhs.wisconsin.gov/children/clts/waiver/family/eligibility.htm>

Again, the purpose of the Children's Long Term Support Programs is to provide individuals with a community alternative to institutionalization. *See Medicaid Waivers Manual Chapter I Overview and Administration Page I-1.* Among a number of eligibility criteria is the requirement that a child meet an institutional level of care. There currently are four levels of care: hospital, nursing home, psychiatric hospital, and intermediate care facility for the developmentally disabled (ICF-DD).

The DHS has developed policy, found at *Appendix A-10 to Bureau of Long-Term Support Medicaid Home & Community-Based Waivers Manual*, which defines and describes those childhood care levels and contains the requirements needed to qualify for Child's Long Term Support Programs. This manual was updated in 2011. In brief those are (all emphasis in the original):

- Hospital Level of Care
A child with a Hospital – Physical Disabilities (PD) Level of Care has needs that are typically met in an in-patient medical hospital setting. The child’s medical needs must be chronic, persistent and expected to last at least six months from the date of review. The skilled care needs cannot be acute and of a short-term duration. *The frequency and complexity of the required skilled medical interventions must be so substantial that without these direct, continuous skilled medical interventions, the child is at risk of institutionalization within a long-term, in-patient medical hospital.*

- Psychiatric Hospital Level of Care
The child with a Psychiatric Hospital - Severe Emotional Disturbance (SED) Level of Care has a long-term, severe mental health condition diagnosed by a licensed psychologist or psychiatrist. In addition, this child demonstrates persistent behaviors that create a danger to self or others, requiring ongoing therapeutic support in order to be able to live at home and in the community. *The intensity and frequency of the required ongoing therapeutic support must be so substantial that without the support the child is at risk of inpatient psychiatric hospitalization.*
A child may be assigned this level of care if the child meets **ALL FOUR of the criteria listed below** for Severe Emotional Disturbance. The criteria are:
 1. The child has a **Diagnosis** of a mental health condition; and
 2. The child’s mental health diagnosis or symptoms related to the diagnosis have existed and are expected to persist for a specific **Duration** of time; and
 3. The child is in need of **Involvement with Service Systems** related to mental health support; and
 4. The child exhibits **Severe Symptomology or Dangerous Behaviors** at a specific intensity and frequency of required interventions such that without this direct, daily community-based intervention, the child is at risk for institutionalization within a psychiatric hospital.

- Intermediate Care Facility for Developmental Disabilities (ICF-DD or ICF-MR)

A child with an ICF/MR - Developmental Disability (DD) Level of Care has a permanent cognitive disability, substantial functional limitations and a need for active treatment. The level of care criteria is based upon the child having needs similar to people in an intermediate care facility for children with mental retardation (ICF/MR). *The intensity and frequency of required interventions to meet the child’s functional limitations must be so substantial that without the intervention, the child is at risk for institutionalization within an ICF/MR.*

A child may be assigned this level of care if the child meets **ALL THREE of the criteria listed below** for Developmental Disability. The criteria are:
 1. The child has a diagnosis of a **Cognitive Disability** that substantially impairs learning and that is expected to continue indefinitely; and
 2. The child demonstrates **Substantial Functional Limitations** when compared to age appropriate activities that are expected to last a year or longer; and
 3. The child has the **Need for Active Treatment.***(emphasis in the original)*

- The Nursing Home Level of Care
The child with a Nursing Home - Physical Disabilities (PD) Level of Care has a long-term medical or physical condition, which significantly diminishes his/her functional capacity and interferes with the ability to perform age appropriate activities of daily living at home and in the community. This child requires an extraordinary degree of daily assistance from others to meet everyday routines and special medical needs. The special medical needs warrant skilled nursing interventions that require specialized training and monitoring that is significantly beyond that which is routinely provided to children. *The intensity and frequency of required skilled nursing interventions must be so substantial that without direct, daily intervention, the child is at risk for institutionalization within a nursing home.*

Taken from Appendix A-10 to Bureau of Long-Term Support Medicaid Home & Community-Based Waivers Manual

There is no contention that Petitioner meets the psychiatric hospital or ICF-DD levels of care so it is the hospital or nursing home levels of care that are at issue here as potential levels of care applicable to Petitioner. I cannot, however, find that Petitioner meets the hospital level of care – the evidence just does not demonstrate that Petitioner needs the direct, skilled and continuous medical interventions required to meet that level of care.

Again, Petitioner has been at the nursing home level of care. The question of whether he continues to meet that level of care is a close call. The *Manual, at Appendix 10*, states the following regarding the nursing home level of care:

...

A child may be assigned this level of care if the child meets **BOTH of the criteria listed below** for Physical Disability. The criteria are:

1. The child has a **Diagnosis** of a medical/physical condition resulting in needs requiring long term care services; and
2. The child requires skilled **Nursing Interventions and/or has Substantial Functional Limitations** requiring hands on assistance from others throughout their day.

...

Appendix 10 of Manual at page 22 (emphasis in the original).

The diagnosis criteria is not an issue here, rather it is the nursing intervention/substantial functional limitation criterion that is involved. There are two standards and a person must meet one or the other to qualify:

2. SKILLED NURSING INTERVENTIONS AND/OR SUBSTANTIAL FUNCTIONAL LIMITATIONS

The child must meet **ONE** of the two Standards (I-II) described below.

STANDARD I: Skilled Nursing Interventions PLUS Substantial Functional Limitations

The child must demonstrate **BOTH** a need for Skilled Nursing/Therapeutic Intervention **PLUS TWO** substantial functional limitations (**A PLUS C, OR B PLUS C**):

A. Needs and receives at least **ONE** Skilled Nursing Intervention listed below that must be performed **daily** and is reasonably expected to continue *at least six months*.

OR

B. Needs and receives at least **TWO** Skilled Nursing/Therapeutic Interventions listed below that must be performed at least **weekly** (*or at the frequency noted below*) and are both reasonably expected to continue *at least six months*.

...

STANDARD II: Substantial Functional Limitations

The child must have substantial functional limitations requiring daily direct hands on assistance in at least **FOUR** of the seven specific areas listed below that are reasonably expected to last for *at least one year*. There is no requirement of skilled nursing or therapeutic interventions for this Standard.

1. **Learning:** A 30% (25% if the child is under one year of age) or greater delay or a score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean based on valid, standardized and norm referenced measures of aggregate intellectual functioning.

2. **Communication:** A substantial functional limitation in communication is defined as a 30% (25% if under one year) or greater delay or a standard score of at least 2 (1.5 if under one year) standard deviations below the mean on valid, standardized and norm referenced measures of BOTH expressive and receptive communication functioning.

3. **Bathing:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in bathing to meet a substantial functional limitation based on the child's age.
4. **Grooming or Dressing:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in grooming or dressing to meet a substantial functional limitation based on the child's age.
5. **Eating:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in eating to meet a substantial functional limitation based on the child's age.
6. **Toileting:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in toileting to meet a substantial functional limitation based on the child's age.
7. **Mobility:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in mobility to meet a substantial functional limitation based on the child's age. The inability to run or to move long distances or between environments related to stamina or ease of movement is NOT a mobility deficit.

NOTE: Minor to moderate global delays in several of the seven areas listed above does not meet the Substantial Functional Limitation Criterion. A significant delay in an area not listed above, such as a behavioral concern or the inability to participate in extra-curricular activities, also does not meet the required Substantial Functional Limitation.
Appendix 10 of Manual at pages 23-26 (emphasis in the original).

The evidence just does not demonstrate that Petitioner has 4 of the described functional limitations to the degree necessary to qualify for Standard II; though there is evidence of his needing some assistance with dressing it is not demonstrated here to be to the degree necessary to be considered a substantial functional limitation. This leaves the level of care eligibility analysis at Standard I of the Nursing home level of Care.

The skilled nursing interventions that must be demonstrated under Standard I are complicated and it is best just to use the exact language of the *Manual*:

The child must demonstrate **BOTH** a need for Skilled Nursing/Therapeutic Intervention **PLUS TWO** substantial functional limitations (**A PLUS C, OR B PLUS C**):

A. Needs and receives at least **ONE** Skilled Nursing Intervention listed below that must be performed **daily** and is reasonably expected to continue *at least six months*.
 OR

B. Needs and receives at least **TWO** Skilled Nursing/Therapeutic Interventions listed below that must be performed at least **weekly** (*or at the frequency noted below*) and are both reasonably expected to continue *at least six months*.

Daily Skilled Nursing Interventions that apply to **BOTH item A and B** above are limited to the following and do not include site care:

- **IV access:** peripheral or central lines for fluids, medications or transfusions. Does not include the use of a port.
- **Tracheostomy care**
- **Oxygen:** oxygen use includes only skilled tasks such as titration, deep suctioning and checking blood saturation levels.
- **Total Parenteral Nutrition (TPN)**
- **Tube feedings:** G-tube, J-tube or NG-tubes
- **Dialysis:** hemodialysis or peritoneal, in home or at clinic.
- **Respiratory treatments:** chest PT, C-PAP, Bi-PAP, IPPB treatments. This does not include inhalers or nebulizers.
- **Wound or special skin care:** only applies if process takes more than one hour a day.

Additional Skilled Nursing/Therapeutic Interventions that can **ONLY** be applied for **item B** above:

- **Bowel or ostomy:** digital stimulation, ostomy site care, changing wafer, and irrigation.
- **Urinary catheter:** straight catheters, irrigations, instilling medications.
- **Physical, occupational, or speech therapy:** only applies if the child is involved in six or more sessions per week with professional therapists.

NOTE: Medication administration for a reasonably stable condition, including topical or oral medication, eye drops, inhalers, nebulizers, growth hormone injections, insulin injections, or chemotherapy, is not considered a skilled nursing intervention.

PLUS

C. The child exhibits **Substantial Functional Limitations** when compared to age appropriate activities in at least **TWO** of the seven specific areas listed below that are reasonably expected to last *at least one year*.

1. **Learning:** A 30% (25% if the child is under one year of age) or greater delay or a score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean based on valid, standardized and norm referenced measures of aggregate intellectual functioning.
2. **Communication:** A substantial functional limitation in communication is defined as a 30% (25% if under one year) or greater delay or a standard score of at least 2 (1.5 if under one year) standard deviations below the mean on valid, standardized and norm referenced measures of BOTH expressive and receptive communication functioning.
3. **Self Care:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in activities of daily living (self care) to meet a substantial functional limitation based on the child's age. Child must demonstrate a deficit in at least ONE of the following five areas of self care:
 1. Bathing
 2. Grooming
 3. Dressing
 4. Toileting
 5. Eating
4. **Mobility:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in mobility to meet a substantial functional limitation based on the child's age. The inability to run or to move long distances or between environments related to stamina or ease of movement is NOT a mobility deficit.
5. **Social Competency:** Refer to APPENDIX A. This Appendix lists deficits in social skills by age groups that demonstrate a substantial functional limitation in social competency.
6. **Work:** Needs direct, hands-on assistance every day to perform their job, significantly beyond the typical assistance needed by other employees with similar duties to complete their job duties. This applies only to children over 16 years of age.
7. **Meal Preparation or Money Management:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in meal preparation or money management to meet a substantial functional limitation based on the child's age. This applies only to children over 18 years of age.

I am concluding that Petitioner meets the Nursing Home Standard I level of care. He requires suctioning 6 to 7 times per day and cannot do it himself. He cannot oxygenate himself. This meets the once daily skilled nursing task. The functional screen indicates he needs assistance with eating. A g-tube is still utilized. Petitioner's IEP demonstrates that he entered the 5th grade in the fall of 2014 but his academic skills are at a 3rd grade level. The IEP indicates he has a full time nurse assigned to him during the school day. Again, this is a close call but the Petitioner has been in the long term waiver program for 4 years. Ideally there would be better testing of learning and communication abilities but the program and school system have not provided those. Finally, the criteria noted above are certainly not to be ignored but on the other hand do rely on a certain amount of judgment in application. In total then, Petitioner is a young man with fragile health that is life threatening and that, in combination with deficits described by his diagnoses, has compromised his ability to learn and communicate with others. The evidence indicates that were it not for all of the efforts of his mother he might well be institutionalized.

Again, this a close call that leaves next year's renewal perhaps tenuous but I am concluding that Petitioner for this year continues to meet Standard I of the nursing home level of care. I am, therefore, reversing the discontinuance of his Wisconsin's Children's Long-Term Support Waivers eligibility as to the level of care issue. Whether he meets other criteria was not an issue for this hearing.

CONCLUSIONS OF LAW

That the available evidence demonstrates that Petitioner continues to meet the level of care required to continue his Wisconsin's Children's Long-Term Support Waivers eligibility.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency with instructions to restore Petitioner's Wisconsin's Children's Long-Term Support Waivers eligibility unless there is some other bar beyond level of care to that eligibility. This must be done within 10 days of the date of this decision.

If there is some other bar to eligibility Petitioner must be notified in writing and may again appeal.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

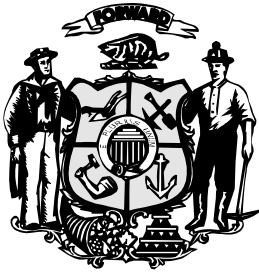
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 22nd day of October, 2014

\sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on October 22, 2014.

Milwaukee Cty Disability Services Division-DSD
Bureau of Long-Term Support